

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CAROLYN MURPHY,	)	
	)	CASE NO. C13-0015-RAJ-MAT
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting	)	APPEAL
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Carolyn Murphy proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends this matter be AFFIRMED.

**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1964.<sup>1</sup> She completed the tenth grade of high school and

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 obtained her GED. Plaintiff previously worked as a receptionist, auto parts counter clerk,  
02 warehouse worker, cashier, daycare worker, fast food worker, box bender, and electrical  
03 inspector. (AR 80-81.)

04 Plaintiff filed an application for SSI in March 2010, alleging disability beginning  
05 November 15, 2008.<sup>2</sup> (AR 194-97.) Her application was denied initially and on  
06 reconsideration, and she timely requested a hearing.

07 ALJ Stephanie Martz held a hearing on October 25, 2011, taking testimony from  
08 plaintiff, a vocational expert (VE), and plaintiff's therapist, Diane Spangler. (AR 32-89.) On  
09 November 7, 2011, the ALJ rendered a decision finding plaintiff not disabled. (AR 11-24.)

10 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review  
11 on November 5, 2012 (AR 1-3), making the ALJ's decision the final decision of the  
12 Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

### 13 **JURISDICTION**

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 15 **DISCUSSION**

16 The Commissioner follows a five-step sequential evaluation process for determining  
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
18 must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff  
19 had not engaged in substantial gainful activity since March 1, 2010, the application date. *See*

20  
21 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

22 <sup>2</sup> It appears that plaintiff previously applied and was denied disability benefits in a final  
decision dated June 18, 2009. (*See* AR 11.)

01 Social Security Ruling (SSR) 83-20 (SSI payments are prorated for the first month for which  
02 eligibility is established after application and after a period of ineligibility).

03 At step two, it must be determined whether a claimant suffers from a severe impairment.  
04 The ALJ found severe: degenerative disc disease with central stenosis and foraminal stenosis  
05 with radiculopathy; meniscal tear left knee; status post fracture left ring finger; obesity;  
06 hypothyroidism; alcohol, methamphetamine, cocaine, and opiate dependence in sustained full  
07 remission; and dysthmic disorder. Step three asks whether a claimant's impairments meet or  
08 equal a listed impairment. The ALJ found plaintiff's impairments did not meet or equal the  
09 criteria of a listed impairment.

10 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
11 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
12 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC  
13 to perform sedentary work, except that she can lift and carry ten pounds occasionally and ten  
14 pounds frequently; sit about six hours; and stand or walk at least two hours in an eight-hour day  
15 with regular breaks. She further found plaintiff: can push/pull within the above-described  
16 exertional limits; occasionally climb ladders, ropes, or scaffolds, and frequently climb ramps  
17 and stairs; frequently balance, kneel, crouch, and crawl; occasionally finger with her left hand;  
18 should avoid concentrated exposure to vibration and hazards; is able to understand, remember,  
19 and carry out very short and simple instructions and make simple decisions; can have  
20 occasional and brief superficial contact with coworkers, supervisors, and the public; should  
21 have a routine and predictable workplace; and would need to change positions between sitting  
22 and standing at will. With that RFC, the ALJ found plaintiff unable to perform her past work.

01 If a claimant demonstrates an inability to perform past relevant work or has no past  
02 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
03 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
04 the national economy. The ALJ concluded plaintiff could perform jobs existing in significant  
05 numbers in the national economy, such as work as a surveillance system monitor and addresser.  
06 The ALJ, therefore, concluded plaintiff was not disabled since the March 1, 2010 application  
07 date.

08 This Court's review of the final decision is limited to whether the decision is in  
09 accordance with the law and the findings supported by substantial evidence in the record as a  
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
14 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff argues the ALJ erred in rejecting consistent medical opinion evidence, in  
17 assessing her credibility, lay witness testimony, and the RFC, and in reaching the conclusion at  
18 step five. She requests remand for an award of benefits or, in the alternative, for further  
19 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by  
20 substantial evidence and should be affirmed.

#### 21 Medical Opinion Evidence

22 Social Security regulations distinguish between "acceptable medical sources" and

01 “other sources.” Acceptable medical sources include, for example, licensed physicians and  
02 psychologists, while other non-specified medical providers are considered “other sources.” 20  
03 C.F.R. §§ 404.1513(a) and (d), 416.913(a) and (d), and SSR 06-03p.

04 In general, more weight should be given to the opinion of a treating physician than to a  
05 non-treating physician, and more weight to the opinion of an examining physician than to a  
06 non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not  
07 contradicted by another physician, a treating or examining physician’s opinion may be rejected  
08 only for “‘clear and convincing’” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391,  
09 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician’s opinion may  
10 not be rejected without “‘specific and legitimate reasons’ supported by substantial evidence in  
11 the record for so doing.” *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.  
12 1983)).

13 Less weight may be assigned to the opinions of “other sources.” *Gomez v. Chater*, 74  
14 F.3d 967, 970 (9th Cir. 1996). However, the ALJ’s decision should reflect consideration of  
15 such opinions, SSR 06-3p, and the ALJ may discount the evidence by providing reasons  
16 germane to each source. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (cited sources  
17 omitted).

18 Plaintiff argues the ALJ erred in the assessment of the medical opinions of treating  
19 physician Dr. Harold Moore, mental health counselor Diane Spengler, examining physicians  
20 Drs. Mark Koenen and James Czysz, and reviewing physician Dr. Diane Fligstein. Given the  
21 existence of contradictory opinion evidence, the ALJ was required to provide specific and  
22 legitimate reasons for rejecting medical opinions.

01 A. Dr. Harold Moore

02 Dr. Moore has served as plaintiff's treating physician for many years. As described by  
03 the ALJ, in August 2011, Dr. Moore opined that plaintiff would have "slight to moderate  
04 impairments in her cognitive and social work factors, indicating [she] would have some  
05 moderate limitations but was still able to function[.]" and, due to her degenerative disc disease  
06 and meniscal tear, could lift up to ten pounds occasionally, stand and sit for one hour, walk for  
07 one hour total in an eight-hour day, and "could 'sit for short periods but would need to stand and  
08 walk frequently, but not far[.]'" (AR 19-20 (discussing AR 871-79).) This was "generally  
09 consistent" with an October 2011 assessment by Dr. Moore. (AR 20 (discussing AR 900-02).)  
10 Previously, in December 2009, Dr. Moore opined plaintiff's chronic low back pain and left  
11 finger fracture would cause "[very] significant interference" with plaintiff's ability to stand,  
12 walk, lift, carry, and handle, but assessed no restrictions on sitting, and opined both that  
13 plaintiff could perform sedentary work and was permanently disabled. (*Id.* (discussing AR  
14 822-25).)

15 The ALJ gave Dr. Moore's opinions little weight:

16 His opinions regarding the claimant's mental abilities and her ability to do  
17 sedentary work are given significant weight. However, his opinion regarding  
18 the claimant's limitations for sitting to one hour in an eight-hour day, postural  
19 limitations, and limitations on reaching with her right hand, are given little  
20 weight. Dr. Moore's treatment notes reflect little objective findings that are  
21 consistent with these opinions. Although Dr. Moore noted the claimant  
22 reported some "tingling" in her right hand in March 2011, he did not indicate  
any treatment was necessary and later examinations do not mention this issue.  
He rarely even notes any complaints of back pain or other objective findings of  
problems relating to the claimant's allegedly disabling back impairment. For  
example, in June 2011, Dr. Moore noted the claimant's chronic back pain, but  
also noted it was "controlled to some extent" with her use of methadone. Dr.  
Moore's opinion that the claimant could not sit for more than an hour per day in

01 2011 also conflicts with his opinion from 2009 in which he did not indicate the  
02 claimant would have any limitations on sitting. Dr. Moore's opinion on sitting  
03 is also inconsistent with the claimant[']s reported activities, which include  
04 reading, watching movies, and using a computer. The claimant states that  
05 when she stands for too long she needs to "sit," and does not indicate she must  
06 spend significant periods of time laying down. Thus, Dr. Moore's opinions are  
07 also inconsistent with the claimant's activities, internally inconsistent, and not  
08 supported by objective findings.

09 (AR 20.)

10 The ALJ also gave little weight to a June 2011 letter from Dr. Moore, wherein he opined  
11 plaintiff could not "work due to her medical and mental health disability." (AR 20, 810.)  
12 (*See also* AR 905 (October 2011 treatment note stating: "She is unable to work due to her knee  
13 injury and chronic back problem.")) In that letter, Dr. Moore pointed specifically to plaintiff's  
14 "degenerative disc disease and anterolisthesis L3 on L4[.]" as well as her obesity,  
15 hypothyroidism, depression, and meniscal tear. (AR 810.) The ALJ found the opinion  
16 "conclusory[.]" stating Dr. Moore "fails to explain the basis for it[.]" and adding it was "not  
17 clear" whether he was familiar with the SSA definition of disability. (AR 20 (also stating:  
18 "Further, as noted above, his other opinions of limitations are similarly unsupported and  
19 inconsistent with the record as a whole. As such, his conclusory opinion that the claimant is  
20 'disabled' merits no weight."))

21 In arguing error, plaintiff first points to Dr. Moore's consistent prescription of  
22 medications for her depression and anxiety, his knowledge of her counseling and methadone  
maintenance, and his reports that her depression was in "fair to poor control." (Dkt. 15 at 8  
(cited sources omitted).) However, the ALJ gave Dr. Moore's opinions as to plaintiff's mental  
abilities significant weight. (AR 20.) An ALJ need not provide reasons for rejecting a

01 physician's opinions where the ALJ incorporated such opinions into the RFC. *Turner v.*  
02 *Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir 2010) (ALJ incorporated opinions by  
03 assessing RFC limitations "entirely consistent" with limitations assessed by physician).  
04 Plaintiff fails to demonstrate that the mild to moderate limitations assessed by Dr. Moore were  
05 not consistent with the assessed RFC.

06 Plaintiff notes that the December 2009 evaluation from Dr. Moore also includes the  
07 opinion that she is "permanently disabled[.]" (AR 825.) However, the ALJ acknowledged  
08 that observation, as well as his simultaneous opinion that plaintiff could perform sedentary  
09 work. (AR 824.) The ALJ's reliance on the opinion as to sedentary work can be deemed  
10 rational. *See Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where  
11 the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion  
12 that must be upheld.") (citing *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)).

13 Plaintiff describes the purported absence of consistent objective findings as "simply not  
14 true[.]" pointing to Dr. Moore's repeated references to MRI findings. (Dkt. 15 at 8 (citing AR  
15 836, 840, 849, 856).) Those findings included a January 23, 2008 MRI of plaintiff's back and  
16 May 25, 2011 MRI of her knee. (AR 463 (reflecting mild and moderate degenerative disc  
17 changes and anterolisthesis of L3 on L4) and AR 860-61 (reflecting radial tear of meniscus,  
18 ligament sprain, ruptured cyst, and "[v]ery small" cartilage defect).)

19 Plaintiff appears to assert error as related to her knee condition. However, consistent  
20 with Dr. Moore's assessment, the ALJ found plaintiff capable of standing and/or walking for a  
21 total of two hours in an eight-hour day with regular breaks. (AR 17; *accord* AR 875 (assessing  
22 plaintiff as capable of standing, at one time without interruption and total in an eight-hour work

01 day, for one hour, finding same with respect to walking, and declining to find plaintiff capable  
02 of lesser amounts of time for each function).)

03 Nor does plaintiff demonstrate error in relation to her back or hand conditions. “The  
04 ALJ need not accept the opinion of any physician, including a treating physician, if that opinion  
05 is brief, conclusory, and inadequately supported by clinical findings.” *Thomas*, 278 F.3d at  
06 957. The ALJ here appropriately pointed to a lack of objective support, including minimal  
07 observations as to plaintiff’s hand, and rare observations of back pain or other objective  
08 findings, as well as the observation that plaintiff’s back pain was controlled to some extent with  
09 medication. (AR 20.) It should further be noted that, in relation to plaintiff’s back, Dr.  
10 Moore’s December 2009 evaluation included consideration of the January 2008 MRI findings,  
11 and he presented no new objective findings to support the more restrictive limitations assessed  
12 subsequently.

13 The ALJ also appropriately considered evidence of inconsistencies relating to the sitting  
14 limitation assessed in 2011, including the absence of any prior assessed limitation and evidence  
15 of plaintiff’s reported activities. *See Morgan*, 169 F.3d at 603 (ALJ appropriately considers  
16 internal inconsistencies within and between physicians’ reports) and *Tommasetti v. Astrue*, 533  
17 F.3d 1035, 1041 (9th Cir. 2008) (inconsistency with the record properly considered by ALJ in  
18 rejection of physician’s opinions); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001)  
19 (affirming rejection of a treating physician’s opinion that was inconsistent with the claimant’s  
20 level of activity). In addition, while plaintiff did testify she needed to get up after thirty  
21 minutes of sitting (AR 47), the ALJ accounted for that testimony by including in the RFC the  
22 need to change positions between sitting and standing at will (AR 17).

01 Plaintiff takes issue with the ALJ's description of Dr. Moore's opinion as conclusory,  
02 pointing to his long history of treatment and longitudinal sense of her impairments. She  
03 maintains the ALJ impermissibly required Dr. Moore to certify his understanding of the Social  
04 Security Act definition of disability. These arguments fail. "Although a treating physician's  
05 opinion is generally afforded the greatest weight in disability cases, it is not binding on an ALJ  
06 with respect to the existence of an impairment or the ultimate determination of disability."  
07 *McLeod v. Astrue*, 634 F.3d 516, 520 (9th Cir. 2011) (quoting *Tonapetyan v. Halter*, 242 F.3d  
08 1144, 1148 (9th Cir. 2001) and citing § 404.1527(e)(1) ("A statement by a medical source that  
09 you are 'disabled' or 'unable to work' does not mean that we will determine that you are  
10 disabled.")) While plaintiff takes a contrary view as to the value of Dr. Moore's letter, she  
11 fails to demonstrate that the ALJ's interpretation of the evidence was not rational. *See*  
12 *Morgan*, 169 F.3d at 599.

13 Finally, plaintiff notes the absence of any contravening evidence from a treating or  
14 evaluating provider with respect to her physical condition. However, while true, the record did  
15 contain contradictory, January 2011 opinion evidence from non-examining State agency  
16 physician Dr. Gordon Hale. (AR 776 (affirming opinion at AR 100-07).) The ALJ found Dr.  
17 Hale's opinion generally consistent with the evidence of record and gave it some weight, but  
18 found it reasonable to limit plaintiff to sedentary work in light of her more recent knee injury.  
19 (AR 19.)

20 "The opinion of a nonexamining physician cannot by itself constitute substantial  
21 evidence that justifies the rejection of the opinion of either an examining physician or a treating  
22 physician." *Lester*, 81 F.3d at 831 (cited sources omitted). However, "the report of a

01 nonexamining, nontreating physician need not be discounted when it ‘is not contradicted by *all*  
02 *other evidence* in the record.’” *Andrews*, 53 F.3d at 1041 (quoting *Magallanes*, 881 F.2d at 752  
03 (emphasis in original)). *Accord Tonapetyan*, 242 F.3d at 1148-49 (contrary opinion of a  
04 non-examining medical expert “may constitute substantial evidence when it is consistent with  
05 other independent evidence in the record.”) Moreover, “[t]he ALJ is responsible for resolving  
06 conflicts in the medical record.” *Carmickle v. Comm’r of SSA*, 533 F.3d 1155, 1164 (9th Cir.  
07 2008). When evidence reasonably supports either confirming or reversing the ALJ’s decision,  
08 the Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094,  
09 1098 (9th Cir. 1999).

10 In this case, plaintiff fails to demonstrate that the ALJ’s resolution of conflicts in the  
11 evidence and reliance on Dr. Hale’s contradictory opinions was not reasonable. Instead, as  
12 reflected above, the ALJ pointed to specific and legitimate reasons for rejecting portions of Dr.  
13 Moore’s opinions, and properly relied on both evidence from Dr. Hale and other consistent  
14 evidence in the record. Therefore, the ALJ’s reasoning in relation to Dr. Moore withstands  
15 scrutiny.

16 B. Diane Spengler

17 The ALJ gave little weight to May 2010 and May 2011 opinions and the testimony of  
18 Ms. Spengler, plaintiff’s treating mental health provider. (AR 21-22.) As described by the  
19 ALJ, Ms. Spengler opined plaintiff’s “anxiety is likely the greatest inhibitor of [her]  
20 functioning,” that she “has poor communication skills, and poor memory and judgment[,]” that  
21 her mental health resulted from childhood trauma, prior to substance abuse issues, and that she  
22 “would not be employable anytime in the near future because of her pain and mental health

01 issues[.]” (AR 21 (discussing AR 802-09 and AR 64-75).)

02       The ALJ found Ms. Spengler’s opinions inconsistent with the evidence in the record as  
03 a whole, contrasting, as an example, her belief that plaintiff has PTSD, with examining  
04 physician Dr. Mark Koenen’s opinion that there was insufficient evidence to establish that  
05 diagnosis. (AR 21-22.) The ALJ also found Ms. Spengler’s opinions inconsistent with  
06 plaintiff’s activities of daily living, stating her ability “to run errands, make doctor’s  
07 appointments, read crime novels, and do household chores support the claimant’s abilities to do  
08 simple, repetitive tasks.” (AR 22.) She further found the opinions inconsistent with Dr.  
09 Koenen’s objective findings, and concluded that Ms. Spengler’s “own notes do not support her  
10 conclusions as they do not reflect significant complaints of depression or anxiety.” (*Id.*)

11       Plaintiff argues the ALJ’s disregard of Ms. Spengler’s testimony “is ill-founded because  
12 it is indeed consistent with the reports of other psychiatric providers, and the fact that [she] is  
13 able to do basic self-care and go to appointments is immaterial.” (Dkt. 15 at 10 (citing *Smolen*  
14 *v. Chater*, 80 F.3d 1273, 1284 n.7 (9th Cir. 1996) (“The Social Security Act does not require  
15 that claimants be utterly incapacitated to be eligible for benefits, and many home activities may  
16 not be easily transferable to a work environment where it might be impossible to rest  
17 periodically or take medication.”)) Plaintiff notes Ms. Spengler’s testimony that she  
18 frequently misses appointments because she is so depressed she cannot get out of bed. (AR 66,  
19 69.) Again, however, plaintiff fails to demonstrate error.

20       The ALJ provided several germane reasons for according Ms. Spengler’s opinions little  
21 weight, including inconsistencies both internally and with the objective findings and other  
22 evidence from Dr. Koenen. *See Morgan*, 169 F.3d at 603. While plaintiff finds the report of

01 Dr. Koenen to reveal more consistency than not, the ALJ's reading of inconsistency between the  
02 opinions is equally rational. For example, Dr. Koenen found plaintiff "did not endorse any  
03 history or symptoms consistent with an actual PTSD diagnosis[]" (AR 710), and found her only  
04 mildly limited in her ability to accept instructions from supervisors, able to perform simple and  
05 repetitive tasks, and mildly impaired in her ability to perform more detailed and complex tasks.  
06 (AR 714.) (*See also* AR 712 (Dr. Koenen's Mental Status Examination results).) Also, as  
07 discussed further below, while assessing various moderate limitations, Dr. Koenen found they  
08 could be expected to improve with psychotherapy and exposure to the workplace. (*Id.*)

09 In addition, while pointing to the consistency of Ms. Spengler's opinions with the  
10 opinions of Drs. Moore and Czysz, plaintiff essentially, and improperly, seeks to re-weigh the  
11 evidence. Because she fails to demonstrate that the ALJ failed to reasonably resolve the  
12 conflicting opinion evidence, she fails to demonstrate error. *See Morgan*, 169 F.3d at 599.

13 Finally, the ALJ also reasonably identified inconsistencies between Ms. Spengler's  
14 opinions and evidence of plaintiff's activities. Plaintiff's contention that such consideration  
15 was "immaterial" should be rejected. *See Tommasetti*, 533 F.3d at 1041; *Rollins*, 261 F.3d at  
16 856. It should further be noted that the ALJ specifically, and appropriately, associated the  
17 activities with her conclusion that plaintiff could perform simple, repetitive tasks. (AR 22.)  
18 For this reason, and for the reasons stated above, the ALJ's assessment of Ms. Spengler's  
19 opinions was sufficient.

20 C. Dr. Mark Koenen

21 The ALJ found examining psychologist Dr. Koenen's July 2010 opinions supported by  
22 his evaluation and gave them significant weight. (AR 20-21.) Plaintiff challenges the ALJ's

01 consideration of Dr. Koenen's opinions that she had moderate impairments in her abilities to  
02 complete a normal workday or workweek, to interact with co-workers, supervisors, and the  
03 public, and tolerate the stress of competitive work. (AR 714.) The ALJ acknowledged these  
04 opinions, but noted Dr. Koenen's clarification that "each of these impairments would be  
05 expected to improve with treatment and exposure to the workplace." (AR 21, 714.)

06 Plaintiff avers an absence of any evidence in the record that her psychiatric conditions  
07 improved with treatment, noting Ms. Spengler's subsequent, October 2011 opinion that she was  
08 not able to work because of her continuing psychiatric impairments. However, plaintiff fails  
09 to account for the fact that Dr. Koenen opined as to his expectation of improvement with both  
10 psychotherapy *and* exposure to the workplace. (AR 713.) Nor does plaintiff acknowledge  
11 the specific type of psychotherapy recommended by Dr. Koenen; namely, psychotherapy  
12 directed towards engaging in "anxiety provoking situations[,] " such as "dealing with aversive  
13 situations and with authority figures[,] " "so that she can learn to better tolerate these situations  
14 and improve." (AR 713-14.) He opined that "[a]ppropriate psychotherapy directed at this  
15 end would likely lead to significant improvement within the next year[,] " but that "continuing  
16 to enable [plaintiff] to avoid anxiety provoking situations (which seems to be the case at  
17 present) will all but assure that her functional ability will never improve." (AR 714.)  
18 Plaintiff does not point to any evidence that she received the type of psychotherapy  
19 recommended by Dr. Koenen.

20 Moreover, plaintiff fails to support a necessary conflict between the limitations assessed  
21 by Dr. Koenen and the RFC. In particular, the ALJ can be said to have accounted for the  
22 limitations as related to interactions and stress by limiting plaintiff to occasional and brief

01 superficial contact with coworkers, supervisors, and the public, and to a routine and predictable  
02 workplace. (*See also* AR 713 (Dr. Koenen also stated that plaintiff's depressive symptoms did  
03 "not appear to be particularly severe at [that] time[,] and that her panic symptoms "appear[ed]  
04 to be largely under control.")) These portions of Dr. Koenen's opinions required no further  
05 consideration by the ALJ. *Turner*, 613 F.3d at 1223. Plaintiff, as such, fails to demonstrate  
06 error.

07 D. Dr. James Czysz

08 The ALJ gave little weight to October 2011 opinions of examining psychologist Dr.  
09 Czysz assessing marked limitations in plaintiff's ability to perform routine tasks without undue  
10 supervision, to perform effectively in a work setting with public contact, and to maintain  
11 appropriate behavior in a work setting. (AR 21 and AR 896-97.)<sup>3</sup> She found:

12 His opinions are inconsistent with the evidence in the record as a whole. For  
13 example, while he discussed the claimant's panic attacks, there is little  
14 indication in the treatment records that the claimant is experiencing panic  
15 attacks. His opinions ignores the fact that the claimant lives on her own and is  
16 able to routinely attend doctors' appointments and obtain her daily methadone  
17 dose. His opinions are also inconsistent with the claimant's ability to have  
18 normal appearance, interaction, and affect during her medical appointments.

16 (AR 21.)

17 Plaintiff denies inconsistency with the record, but points to the properly discounted  
18 opinions of Dr. Moore and Ms. Spengler as evidence of consistency. She does not  
19 demonstrate that the ALJ's reliance on the contradictory opinion evidence from Dr. Koenen and  
20 reviewing psychologists Drs. Fligstein and Hacker was not rational.

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21 3 Plaintiff notes that Dr. Czysz reached similar conclusions in an August 12, 2008 evaluation,  
22 but such opinions would have been relevant to and addressed in the final June 2009 decision denying  
benefits. (*See* AR 11.)

01 Plaintiff describes as inaccurate the ALJ's observation as to evidence of her panic  
02 attacks. However, she relies almost entirely on her own report, either on forms or to medical  
03 providers, of her history of panic attacks. (*See* AR 63, 211, 219, 239, 246, 252, 267, 709, 745.)  
04 Other documents pointed to are either irrelevant to the current time period (AR 454, 512 (same  
05 document, in different form) or of questionable relevance (AR 352; *see also* AR 745). Instead,  
06 as suggested by the Commissioner, the fact that plaintiff reported panic attacks in only one out  
07 of some sixteen therapy sessions (*see* AR 881-92) provides support for the ALJ's rejection of  
08 the opinions of Dr. Czynsz.

09 Finally, plaintiff maintains the ALJ impermissibly substituted her judgment for that of  
10 Dr. Czynsz in finding his opinions inconsistent with the ability to have a normal appearance,  
11 interaction, and affect during medical appointments. However, as stated above, it is entirely  
12 appropriate for the ALJ to consider evidence of inconsistencies in the record, *Tommasetti*, 533  
13 F.3d at 1041, and, further, the ALJ's responsibility to resolve conflicts in the medical opinion  
14 evidence, *Carmickle*, 533 F.3d at 1164. The ALJ, therefore, also appropriately considered  
15 inconsistency between Dr. Czynsz's opinions and the fact that plaintiff lives on her own and is  
16 able to routinely attend medical appointments and obtain her daily methadone dose. Plaintiff,  
17 in sum, fails to demonstrate any error in the ALJ's consideration of the opinions of Dr. Czynsz.

18 E. Dr. Diane Fligstein

19 In July 2010, reviewing State agency psychologist Dr. Fligstein found plaintiff ability to  
20 understand and carry out short, simple instructions and work-like procedures, make simple  
21 decisions, maintain a normal workweek, ask simple questions, maintain appropriate grooming,  
22 avoid workplace hazards, and use public transportation. (AR 718.) Dr. Hacker, in January

2011, affirmed that opinion. (AR 794.) The ALJ found the opinions consistent with the evidence in the record as a whole and accorded them significant weight. (AR 21.)

Plaintiff maintains the ALJ impermissibly “cherry-picked” Dr. Fligstein’s opinions by ignoring various moderate limitations assessed. (See AR 716-18.) However, as the Commissioner observes, the ALJ properly relied on the narrative portion of the form completed by Dr. Fligstein, rather than the check-box portion of that form. Program Operations Manual System (POMS) DI 25020.010 at B.1.<sup>3</sup> Also, in describing Dr. Fligstein’s opinions as “vague and unhelpful[]” (Dkt. 22 at 7), plaintiff focuses on only one statement in the report from Dr. Fligstein, and fails to fully account for the statement made. (See AR 718 (“Her adequate cognitive functioning and [activities of daily living] during her [consultative evaluation] also support her ability to engage in simple, routine tasks the majority of the time.”)) Nor, for the same reasons discussed previously, does plaintiff demonstrate any error in Dr. Fligstein’s comparison of Ms. Spengler’s opinion as to plaintiff’s inability to work with evidence that plaintiff runs errands, goes to doctor appointments, reads crime novels, and perform household chores. The ALJ’s consideration of this and the other medical opinion evidence should be upheld.

#### Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant’s testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). See also *Vertigan v. Halter*,

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<sup>3</sup> Although the POMS “does not have the force of law” it “is persuasive authority.” *Warre*, 439 F.3d at 1005.

01 260 F.3d 1044, 1049 (9th Cir. 2001). “General findings are insufficient; rather, the ALJ must  
02 identify what testimony is not credible and what evidence undermines the claimant’s  
03 complaints.” *Lester*, 81 F.3d at 834. “In weighing a claimant’s credibility, the ALJ may  
04 consider his reputation for truthfulness, inconsistencies either in his testimony or between his  
05 testimony and his conduct, his daily activities, his work record, and testimony from physicians  
06 and third parties concerning the nature, severity, and effect of the symptoms of which he  
07 complains.” *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

08 The ALJ in this case found plaintiff’s impairments could be reasonably expected to  
09 cause some of the alleged symptoms, but that her statements concerning the intensity,  
10 persistence, and limiting effects of those symptoms were not entirely credible. As set forth  
11 below, the ALJ provided several clear and convincing reasons for this determination.

12 First, the ALJ considered that plaintiff “has had little treatment for, or complaints of,  
13 back pain.” (AR 18.) The ALJ pointed specifically to the few complaints of back pain in Dr.  
14 Moore’s treatment notes, and the fact that plaintiff has done little else than take methadone as  
15 treatment, and found her lack of consistent complaints to undermine the alleged severity of her  
16 back condition. (*Id.*) In challenging this reasoning, plaintiff points to the records of Dr.  
17 Moore, while conceding that the treatment for her chronic back condition is conservative.  
18 However, the ALJ’s reasoning was entirely appropriate. Indeed, “evidence of ‘conservative  
19 treatment’ is sufficient to discount a claimant’s testimony regarding severity of an  
20 impairment[.]” *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007); *see also Meanel v. Apfel*,  
21 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain complaints where petitioner’s  
22 “claim that she experienced pain approaching the highest level imaginable was inconsistent

01 with the ‘minimal, conservative treatment’ that she received”).

02       Second, the ALJ considered that “[a]lthough there is insufficient evidence to indicate . .  
03 . ongoing substance abuse issues, the evidence in the record suggested [plaintiff] has not been  
04 entirely honest about her usage.” (AR 18.) Plaintiff criticizes this reasoning as impermissible  
05 speculation, contending drug use is not an issue in this case, noting the absence of any opinion  
06 evidence as to an active substance abuse problem, as well as that the ALJ found her drug and  
07 alcohol abuse in full-sustained remission. These arguments fail.

08       The ALJ noted a January 2011 incident in which plaintiff refused to provide a urine  
09 sample for drug testing, and her statement on the following day that “she would sometimes  
10 ‘smoke crack on a dark, cloudy day[.]’” (AR 18 (citing AR 784).) The ALJ noted that, in  
11 October 2011, plaintiff reported “having a ‘cocaine dirty’ in January that she did not want  
12 anyone to know about, particularly in light of her application for SSI benefits[.]” (*Id.* (citing  
13 AR 940).) The ALJ also noted other issues associated with plaintiff’s urine samples at her  
14 methadone clinic, including that, in April and October 2011, she “had low creatinine levels,  
15 which can indicate a diluted sample[.]” and that, in July 2011, she refused to leave a sample and  
16 did not leave another sample until more than a week later. (*Id.* (citing AR 909).) The ALJ  
17 found plaintiff’s credibility “further undermined by the possibility she is withholding  
18 information[.]” pointing to the fact that, also in October 2011, plaintiff referenced the existence  
19 of a letter, not included in the record, but “which apparently discussed ‘a grey area’” in her life  
20 “and cocaine relapses[.]” (*Id.* (citing AR 940).)

21       An ALJ may consider “ordinary techniques of credibility evaluation, such as the  
22 claimant’s reputation for lying, prior inconsistent statements concerning the symptoms, and

01 other testimony by the claimant that appears less than candid[.]” *Smolen*, 80 F.3d at 1284.  
02 *See also Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (ALJ appropriately considers  
03 reputation for truthfulness and inconsistencies in plaintiff’s testimony). Proper considerations  
04 include inconsistencies regarding drug and alcohol usage. *See Verduzco v. Apfel*, 188 F.3d  
05 1087, 1090 (9th Cir. 1999). Further, “[i]n reaching [her] findings, the law judge is entitled to  
06 draw inferences logically flowing from the evidence.” *Sample v. Schweiker*, 694 F.2d 639,  
07 642 (9th Cir. 1982) (cited sources omitted). In this case, contrary to plaintiff’s contention, the  
08 ALJ’s reasoning associated with plaintiff’s drug use and testing, and generally touching upon  
09 questions of her honesty and forthrightness, was entirely appropriate and well supported.

10 The ALJ next reflected that plaintiff “appears to be trying to portray herself as  
11 completely disabled.” (AR 18.) She references statements in the record reflecting plaintiff’s  
12 intention to never give up in seeking SSI and that “she would ‘never work again[.]’” (AR 18  
13 (citing AR 926, 930).) She also contrasts plaintiff’s testimony as to her limited ability to walk,  
14 with reports of her daily walking, losing weight and maintaining an exercise regime, her ability  
15 to take care of her small apartment, and that exercise and daily walking helped her deal with her  
16 knee pain. (*Id.* (citing AR 925, 939).)

17 Again, plaintiff fails to demonstrate error in the ALJ’s reasoning. One does not need to  
18 be “utterly incapacitated” in order to be found disabled under the Social Security Act. *Fair v.*  
19 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Nevertheless, a claimant’s claims of “a totally  
20 debilitating impairment” may be discredited when the claimant reports participation in  
21 everyday activities that indicate capacities transferrable to a work setting, even if those  
22 activities suggest some difficulty functioning. *Molina*, 674 F.3d at 1112-13. Here, the ALJ

01 reasonably contrasted plaintiff's claims of disability and limitations with contrary evidence in  
02 the record.

03 Finally, the ALJ found an absence of support for plaintiff's allegation of disabling panic  
04 attacks. (AR 19.) The ALJ pointed specifically to the fact that, between November 2009 and  
05 September 2011, plaintiff did not once indicate to Ms. Spengler symptoms of panic attacks, and  
06 that her counseling "seemed to focus mostly on . . . family relationships." (*Id.* (citing AR  
07 881-92).) As reflected above, one of plaintiff's counseling sessions did reference panic  
08 attacks. (AR 885.) However, the failure to acknowledge that reference may be deemed  
09 harmless. *See Molina*, 674 F.3d at 1115 (ALJ's error may be deemed harmless where it is  
10 "inconsequential to the ultimate nondisability determination."; court looks to "the record as a  
11 whole to determine whether the error alters the outcome of the case.") (cited sources omitted).  
12 It remains relevant that plaintiff only once reported panic attack symptoms to Ms. Spengler.  
13 That is, the ALJ properly considered the inconsistency between plaintiff's allegation and the  
14 evidence in the record. *See Tonapetyan*, 242 F.3d at 1148. The ALJ, in sum, provided a  
15 number of clear and convincing reasons to find plaintiff less than fully credible.

#### 16 Lay Witness Evidence

17 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
18 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*  
19 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay  
20 witnesses only upon giving germane reasons. *Smolen*, 80 F.3d at 1288-89.

21 The ALJ here noted Teresa Reynolds' reports that plaintiff "has no trouble getting along  
22 with others, and that she gets along with authority figures 'just fine[,]'" that she "runs errands

01 and goes to appointments using public transportation[.]” and that plaintiff “can only walk a  
02 block or two,” and “uses a cane[.]” (AR 22 (citing AR 296-303).) The ALJ found the  
03 statement generally consistent with the assessed RFC, but gave the portion of the report as to  
04 use of a cane little weight given that plaintiff did not report using a cane. (*Id.*)

05 Contrary to plaintiff’s contention, the ALJ did not afford the entire lay statement little  
06 weight given the reference to a cane, she explicitly afforded only the portion of the statement  
07 referencing a cane little weight. Plaintiff fails to demonstrate the ALJ erred in reaching that  
08 conclusion. Nor does plaintiff otherwise undermine the ALJ’s consideration of the lay  
09 statement. Instead, the ALJ reasonably deemed the lay statement generally consistent with the  
10 assessed RFC which included, *inter alia*, significant limitations in plaintiff’s ability to stand  
11 and walk, and the need for regular breaks in standing and walking.

#### 12 RFC Assessment

13 At step four, the ALJ must identify plaintiff’s functional limitations or restrictions, and  
14 assess his work-related abilities on a function-by-function basis, including a required narrative  
15 discussion. *See* 20 C.F.R. §§ 404.1545, 416.945; SSR 96-8p. RFC is the most a claimant can  
16 do considering his or her limitations or restrictions. *See* SSR 96-8p. The ALJ must consider  
17 the limiting effects of all of plaintiff’s impairments, including those that are not severe, in  
18 determining his RFC. §§ 404.1545(e), 416.945(e); SSR 96-8p.

19 Plaintiff avers error in the ALJ’s failure to consider all of the above-described medical  
20 opinion evidence. However, this mere restating of plaintiff’s argument fails to establish error.  
21 *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

22 Plaintiff also maintains the ALJ erred by failing to address her reaction to stress, as

01 mandated by SSR 85-15. Again, however, plaintiff fails to demonstrate error by relying on a  
02 reiteration of arguments addressed above, including evidence associated with panic attacks and  
03 the medical opinions as to her mental impairments. Moreover, plaintiff fails to acknowledge  
04 the inclusion of limitations in the RFC associated with and accounting for her mental  
05 impairments, including those relating to very short and simple instructions, simple decisions,  
06 occasional and brief superficial contact with others, and the need for a routine and predictable  
07 workplace. (AR 17.)

08 Finally, plaintiff alleges the ALJ failed to take into account her left finger impairment,  
09 pointing to Dr. Moore's opinion that this impairment caused her marked difficulty in handling  
10 and carrying. (AR 824.) The ALJ, however, both adequately addressed Dr. Moore's  
11 opinions, and accounted for this impairment by limiting plaintiff to occasional fingering with  
12 her left hand. (AR 17, 20, 82-83.) Plaintiff, in sum, fails to demonstrate any error in the RFC  
13 assessment.

#### 14 Step Five

15 Plaintiff avers error at step five based on a deficient RFC and incomplete hypothetical to  
16 the VE. However, because the Court finds no error in the assessment of the medical evidence  
17 and assessed RFC and, therefore, the corresponding hypothetical to the VE, this restating of  
18 plaintiff's argument fails to establish error at step five. *Stubbs-Danielson*, 539 F.3d at  
19 1175-76.

20 Plaintiff also avers error in relation to the number of jobs identified at step five. The  
21 VE identified two jobs: (1) surveillance system monitor, with 244 jobs in Washington State  
22

01 and 8,359 jobs nationally; and (2) addresser, with 245 jobs<sup>4</sup> regionally and 18,847 jobs  
02 nationally. (AR 82-83.) He also testified that, given the inclusion of a sit/stand at will  
03 requirement in the RFC, the number of addresser jobs would be reduced by fifty percent. (AR  
04 83-85.) The ALJ concluded that this evidence established the existence of a significant  
05 number of jobs in the national economy plaintiff could perform. (AR 23-24.)

06 Plaintiff asserts that the identification of less than 125 jobs in either occupation is  
07 insufficient to meet the Commissioner's step five burden. In support, she points to cases  
08 wherein the Ninth Circuit determined that the identification of a small numbers of jobs did not  
09 suffice at step five. *See Beltran v. Astrue*, 676 F.3d 1203, 1206-07 (9th Cir. 2012) (finding 135  
10 regional surveillance monitor jobs qualifies as a 'very rare' number[,]" and that "[a]lthough  
11 1,680 jobs might seem a 'significant number' standing alone, distributing these jobs between  
12 several regions across the nation shows that it is not 'significant' after all."); *Walker v.*  
13 *Matthews*, 546 F.2d 814, 820 (9th Cir. 1976) (rejecting ALJ's reliance on "the existence of a  
14 few scattered jobs[]" in two potential occupations).

15 Plaintiff does not accurately reflect the number of regional jobs identified. The VE  
16 testified, and the ALJ found, that only the addressor jobs would be reduced with the inclusion of  
17 a sit/stand option. (AR 23-24, 83-84.) Considering the fifty percent reduction in addresser  
18 jobs, the ALJ relied on a total of some 364 jobs regionally and 17,782 jobs nationally to support  
19 her step five decision.

20 The Ninth Circuit has "never set out a bright-line rule for what constitutes a 'significant  
21 number' of jobs." *Beltran*, 676 F.3d at 1206. It has, however, found "a comparison to other

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22 <sup>4</sup> The ALJ mistakenly identified this number as 225. (*See* AR 23 and AR 83.)

cases . . . instructive.” (*Id.*) The Ninth Circuit has further made clear that “[t]he statute in question indicates that the ‘significant number of jobs’ can be *either* regional jobs (the region where a claimant resides) *or* in several regions of the country (national jobs).” *Beltran*, 676 F.3d at 1206 (emphasis in original) (citing 42 U.S.C. §§ 423(d)(2)(A)). As such, upon finding “*either* of the two numbers ‘significant,’” the Court “must uphold the ALJ’s decision.” *Id.*

Here, it is arguable whether, as compared to other cases, a total of some 364 jobs regionally constitutes a significant number. *See, e.g., Gray v. Comm’r of the SSA*, No. 09-35212, 2010 U.S. App. LEXIS 2609 at \*63 (9th Cir. Feb. 8, 2010) (980 jobs in Oregon and 59,000 jobs nationally significant); *Thomas*, 278 F.3d at 960 (1,300 jobs in Oregon region and 622,000 in the national economy significant); *Meanel v. Apfel*, 172 F.3d 1111, 1114-15 (9th Cir. 1999) (between 1,000 and 1,500 jobs in the local area significant); *Moncada v. Chater*, 60 F.3d 521, 524 (9th Cir. 1995) (2,300 jobs in San Diego County and 64,000 jobs nationwide significant); *Barker v. Secretary of Health & Human Servs.*, 882 F.2d 1474, 1478-79 (9th Cir. 1989) (1,266 jobs in the Los Angeles/Orange County area significant); *Martinez v. Heckler*, 807 F.2d 771, 775 (9th Cir. 1987) (amended) (3,750 to 4,250 jobs regionally significant); *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 982 & n.1 (C.D. Cal. 2005) (approximately 1,700 jobs locally and 38,000 jobs nationally significant). At the same time, as the Commissioner observes, 364 regional jobs almost doubles the 135 jobs at issue in *Beltran*. *See also Yelovich v. Colvin*, No. 11-36071, 2013 U.S. App. LEXIS 13248 at \*4 (9th Cir. Jun. 27, 2013) (noting that the Ninth Circuit has “referenced cases finding as few as 500 jobs significant.”) (citing *Barker*, 882 F.2d at 1478-79 (citing *Jenkins v. Bowen*, 861 F.2d 1083, 1087 (8th Cir. 1988) (holding as few as 500 jobs significant))).

01 Also, plaintiff does not raise a challenge to the ALJ's reliance on the number of jobs  
02 identified nationally. (See Dkt. 15 at 17-18 and Dkt. 22 at 9.) That number – 17,782 in total –  
03 entails more than ten times the number of jobs deemed not significant in *Beltran*, 676 F.3d at  
04 1207 (“1,680 jobs distributed over *several* regions cannot be a ‘significant number[.]’”)  
05 (emphasis in original). Further considering that number, the Court concludes that the ALJ  
06 properly supported his step five decision with a significant number of jobs in the national  
07 economy plaintiff could perform. See, e.g., *Yepiz v. Colvin*, No. CV 12-05226 AJW, 2013  
08 U.S. Dist. LEXIS 46262 at \*25-26 (C.D. Cal. Mar. 28, 2013) (800 jobs regionally and 15,000  
09 jobs nationally significant); *Albidrez v. Astrue*, 504 F. Supp. 2d 814, 824 (C.D. Cal. 2007)  
10 (1,445 job regionally and 17,382 jobs nationally significant). Plaintiff, therefore, fails to  
11 demonstrate reversible error at step five.

12 CONCLUSION

13 For the reasons set forth above, this matter should be AFFIRMED.

14 DATED this 22nd day of August, 2013.

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16 

17 Mary Alice Theiler  
18 Chief United States Magistrate Judge  
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